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No. 82-67

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PUERTO RICO MARITIME SHIPPING AUTHORITY,
Petitioner,

v.

FEDERAL MARITIME COMMISSION,
Respondent.

BRIEF OF THE GOVERNMENT OF THE VIRGIN ISLANDS AND THE PUERTO RICO MANUFACTURERS ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASH., D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly affirmed the Federal Maritime Commission's finding that a domestic offshore carrier had failed in part to meet its statutorily imposed burden of proof with respect to one aspect of the carrier's test year expense projections.

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STATEMENT OF THE CASE

In December of 1980, the four carriers serving the U.S. Atlantic and Gulf/Puerto Rico trades simultaneously posted general rate increases of approximately 17 percent. The rate increase filed by one such carrier, Petitioner Puerto Rico Maritime Shipping Authority ("PRMSA"), was calculated to generate an additional $45.2 million in revenue during the first year of its imposition. Of that amount, PRMSA claimed that $25.2 million—more than 55 percent of the entire rate increase—would be attributable to its rising fuel costs that, under the "cost-of-service" ratemaking imposed by the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. §§ 843, *et seq.*, PRMSA sought to recoup from the

shipping public. PRMSA arrived at its fuel expense projection via a forecast that its fuel costs would increase from $29.1 million in the historic year to $54.7 million in its test year, an 88 percent increase predicated on an assumed rise from a cost of $19.41 per barrel of fuel over the historic year to $39.99/bbl by the end of the test year.

Following protests to these rate increases, based, *inter alia*, on PRMSA's meteoric fuel cost projection, the Federal Maritime Commission ("FMC") ordered an investigation, pursuant to the expedited procedure required under the Public Law 95-475 amendments to the Intercoastal Shipping Act, into the lawfulness of PRMSA's rate increase. Respondents, the Government of the Virgin Islands and the Puerto Rico Manufacturers Association ("GVI/PRMA"), participated fully in that investigation. The FMC administrative law judge issued a recommended decision approving that increase in full, but, on appeal, the FMC found that PRMSA had not sustained its burden of proving the acceptability of its fuel cost projection.[1] However, rather than rejecting the carrier's fuel cost projection entirely, the FMC adopted an average test year fuel price of $32/bbl, which was the actual cost PRMSA paid for its fuel during the first month of the test year, a period over which the agency determined that fuel prices would at least remain stable if not decline.

PRMSA sought and was granted an expedited hearing before the Court of Appeals for the District of Columbia Circuit on the merits of its claim that the FMC erred in its

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[1] Section 3(b) of the Intercoastal Shipping Act, 46 U.S.C. § 845(b), specifies that "[a]t any hearing . . . the burden of proof to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the carrier or carriers."

findings with respect to the fuel cost determination and several other rate of return matters. The Court of Appeals, per Judge Wald, on May 14, 1982 issued an opinion affirming the FMC's decision in all respects. PRMSA's petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Summary Of Argument

This case fails to raise any matter warranting the exercise of this Court's certiorari jurisdiction. It turns entirely on the FMC's factual determination that the carrier had failed to meet its burden of proof, a finding concurred in fully by the Court of Appeals and an evidentiary matter clearly inappropriate for review by this Court. PRMSA's petition thus improvidently seeks to invoke this Court's jurisdiction on the bases of: (1) a purported "conflict" with other decisions establishing a legal principle that was adhered to by the Court of Appeals in this instance and which allowed PRMSA, albeit without success, to present extensive "offsetting" evidence in the proceeding below; (2) the lower court's alleged "misreading" of the relevant statute that the agency in question previously acknowledged to be correct; (3) a purported "absence" of pertinent evidence that is only the product of petitioner's omission of reference to material portions of the record below; and (4) a mistaken claim that the Court of Appeals gratuitously critized PRMSA's forecast methodology. These points are discussed below.

1. This Court Should Not Exercise Its Jurisdiction To Review An Agency's Evidentiary Determination That Was Concurred In By The Court Of Appeals.

More than half of PRMSA's argument in favor of granting its petition is devoted to a critique of the factual bases

for the FMC and Court of Appeals decisions, and the balance centers on what is shown below to be a mistaken effort to establish a conflict with the Seventh Circuit. The Court is thus here asked to review the FMC's evidentiary determination that PRMSA failed to meet its burden of proof on its fuel forecast, a finding concurred in by the Court of Appeals in a careful and thorough opinion. However, "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). For this reason alone the petition should be denied, and, as shown further, there was no factual or legal error by the FMC or the Court of Appeals in reaching the conclusion here challenged by petitioner.

2. The Court Of Appeals Decision Does Not Conflict With Any Other Ruling, And PRMSA Was Afforded Ample Opportunity To Present "Offsetting" Evidence.

The Court of Appeals decision in this instance plainly does not conflict with the Seventh Circuit's decision in *Indiana Municipal*[2] or with that of other D.C. Circuit panels in the *I&M*[3] or *Chatham*[4] cases. Even PRMSA is compelled to concede that the Court of Appeals here did not depart from the legal *principle* established in those decisions, only that the court improperly applied that

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[2] *Indiana Mun. Elec. Ass'n* v. *FERC*, 629 F.2d 480 (7th Cir. 1980).

[3] *Indiana & Mich. Mun. Distrib. Ass'n* v. *FERC*, 659 F.2d 1193 (D.C. Cir. 1981).

[4] *Villages of Chatham & Riverton, Ill.* v. *FERC*, 662 F.2d 23 (D.C. Cir. 1981).

principle by "eliminat[ing] the touchstone of the test-year ratemaking cases—the presentation of offsetting considerations so that the overall rate result can be determined." PRMSA Petition, p. 18 (footnote omitted).

While this unquestionably fails to constitute a "conflict" among the circuits warranting the exercise of this Court's jurisdiction, PRMSA is also mistaken in claiming it was denied the opportunity to present evidence offsetting its gross overestimate of fuel cost increases. One example of the many in the agency record demonstrates the point. When PRMSA first presented to the FMC its data on cargo and revenue projections for the test year, it forecasted carrying 171,441 units of cargo generating more than $314 million in revenue. When PRMSA presented its direct case during the hearing phase of the agency proceeding, however, that forecast was reduced by almost 3,800 units and $6.5 million in revenue purportedly due to a reduction in social assistance payments in Puerto Rico following just-announced Reagan Administration "budget cuts." Because it was shown that the then-unknown level of such reductions would not even take effect until the near close of the carrier's test year and because PRMSA failed to explain how it had translated its hypothetical amount of budget cuts into tons of cargo that would not move in the trade, both the ALJ and the Commission rejected this attempt to reduce forecasted revenues. The agency did, however, accept other post-forecast evidence of factors reducing the carrier's original cargo projections. *See* App. B at 79a; App. C at 168a-169a. PRMSA, moreover, did not seek Court of Appeals review of the agency's refusal to credit its evidence on the effect of the "budget cuts."

Clearly, therefore, PRMSA was afforded ample opportunity to present offsetting evidence based on post-fore-

cast, actual events. The asserted conflict between circuits is thus non-existent, and PRMSA's claim that it was denied the opportunity to present offsetting evidence is flatly wrong.[5]

3. The Petition Fails To Present Any Other Matter Warranting The Exercise Of This Court's Jurisdiction.

PRMSA cites three other reasons for granting its petition, all of which are legally or factually inadequate and are otherwise insufficient to warrant review by this Court. We address these matters briefly below:

a. The Court did not "misread the statute." PRMSA objects to the balance of carrier and consumer interests undertaken by the Court of Appeals in noting that agency acceptance of the carrier's inflated fuel forecast would entirely preclude any remedy on the part of shippers while PRMSA could file for a rate increase if the scaled-down estimate adopted by the FMC proved too low. PRMSA heavily emphasizes that "[t]here is absolutely no cost-pass-through authority," Petition, p. 11, although PRMSA does not explain how this matter rises to the dignity of one warranting review by this Court. PRMSA

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[5] So specious are these claims in support of the petition that they seem only the vehicle for including footnote references (fns. 10 and 11 at pp. 18-19 of the petition) to PRMSA's actual results for the test year and the gist of a petition for "emergency relief" (*i.e.*, a request that PRMSA be relieved of its statutory obligation to make refunds of the unlawful rates it collected) pending before the FMC. Such extra-record matters are not properly before this Court; the financial data PRMSA submitted have never been scrutinized in an agency proceeding; those data in any case show PRMSA still earning a positive eight percent return on rate base; and the pendency of PRMSA's "emergency petition" to the FMC is, if anything, reason for this Court to deny certiorari at this juncture.

in any case mischaracterizes the point *not* as made by the Court of Appeals but as initially made by the FMC in its order. In deciding to adopt a lower cost estimate, rather than denying PRMSA any rate increase based on fuel costs, the FMC also noted the consumers' lack of a remedy and pointed out that "[i]f this [revised fuel cost] figure proves to be too low, PRMSA can utilize the Commission's present policy of allowing cost-pass-through rate increases as the need arises." App. A at 79a. In an accompanying footnote, the agency further noted that, proceeding from its recent ruling in *Bunker Surcharges in the Domestic Offshore Trades*, 20 S.R.R. 401 (1980), "fuel cost increases may be accommodated by permitting carriers to file overall rate increases with alternative abbreviated data." App. A at 79a, n.37.

The agency was thus explicit in inviting PRMSA to take advantage of its cost-pass-through policy, an invitation that the carrier's subsequently falling fuel prices made it impossible for PRMSA to accept, and the question whether the Court of Appeals was proper in characterizing the matter as a "legal right" is one of purely academic interest that plainly fails to warrant review by this Court.

b. There was ample evidence of "dramatic changes in world oil markets." In support of the agency finding that PRMSA had failed to meet its burden of proof on the reliability of its fuel forecast, the Court of Appeals cited certain periodical excerpts, made a part of the agency record, which showed that the assumptions underlying the one-year, 88 percent increase in fuel costs projected by the carrier were untenable. PRMSA then emphasizes that these excerpts "*were the only evidence relating in any way to prospective changes in oil markets.*" PRMSA

Petition, p. 12 (emphasis in original). GVI/PRMA would emphasize that PRMSA's statement is simply incorrect.

We would refer the Court to the 22 pages of direct, rebuttal and surrebuttal testimony before the FMC of GVI/PRMA's witness, Dr. Suphan Andic, who in all three rounds of testimony criticized not only PRMSA's forecast methodology but also its forecast assumptions. Appended to those pages of Dr. Andic's discursive testimony were most of the excerpts cited by the Court, but that testimony went much further in explaining that the deepening oil glut (so severe that decontrol of domestic oil prices, ten months earlier than assumed by PRMSA's forecast, failed to halt the decline in oil prices) had not been accounted for in the assumptions used in the Data Resources, Inc. ("DRI") forecast relied on by PRMSA. (In fact, PRMSA admitted that it did not even know what DRI's forecast assumptions were.) Little wonder, then, that no PRMSA witness at any point in the proceeding attempted to dispute Andic's testimony on these matters, and it is even less surprising that the FMC found that PRMSA has failed to meet its burden of proof on the issue. Accordingly, there is no basis to claim that the FMC had no other record evidence on which to reject the carrier's fuel forecast.

c. The Court properly perceived the "straight line" flaw in PRMSA's methodology. PRMSA lastly complains that the Court of Appeals relied upon a gratuitous criticism of its forecast methodology in affirming the agency's decision. While the fact that the court's decision also rested on several other independent and unassailably valid grounds makes this a plainly insufficient reason for granting PRMSA's petition, the carrier is again mistaken in its characterization of the court's reasoning. While it is true that the linear least square fit regression analysis

PRMSA used to correlate its actual 1980 bunker prices and DRI's data on crude oil prices was not a straight line extrapolation, it is also true that the court was not at this juncture discussing that aspect of PRMSA's methodology. This is evident from the court's footnote that PRMSA only partially quotes at p. 15 of its petition. Read in full, that footnote (App. A at 18a, n.17) makes clear that the court found fault with PRMSA's straight line extrapolation of its widely fluctuating 1980 bunker fuel prices as a basis for projecting that test-year fuel prices would rise at a steady rate. And, while the FMC did not dwell on the point at length, the portion of the agency opinion cited by the court (*see* App. B at 78a, n.36) did make the salient observations that served as the predicate for the court's methodological criticism, *i.e.*, the shortcomings of applying a straight line trend analysis to a data series that fluctuates unpredictably over the time period in question. The Court of Appeals was thus correct in its analysis and did not substitute its judgment for that of the agency.

CONCLUSION

The Court of Appeals decision here at issue does not in any way conflict with decisions of the Seventh Circuit, and the only other grounds on which PRMSA seeks to invoke this Court's jurisdiction amount to a rehash of evidentiary and factual determinations properly made by an agency with expertise in ratemaking matters and concurred in fully by the Court of Appeals. The petition must accordingly be denied.

Respectfully submitted,

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